

REMARKS

This Response is submitted in reply to the non-final Office Action mailed on December 6, 2005. Claim 9 is pending in this application. Claims 1-8 and 10-29 were previously canceled. In the Office Action, Claim 9 is rejected under 35 U.S.C. §112, second paragraph, Claim 9 is rejected under 35 U.S.C. §102, Claim 9 is rejected under 35 U.S.C. §103 and Claim 9 is provisionally rejected under obviousness type double patenting. In response Claim 9 has been amended, and Claims 30-48 have been added. These amendments do not add new matter. In view of amendments and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claim 9 is rejected under 35 U.S.C. §112, second paragraph, as allegedly being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. Specifically, the Patent Office alleges that the phrase “a photoprotecting effective amount” in Claim 9 is not clear. In response, Applicants respectfully submit that one having ordinary skill in the art could determine specific values for the photoprotecting effective amount based on Applicants’ disclosure. See, MPEP 2173.05(c). For example, the specification teaches guidelines as to the intended utilities of the claimed pet food and provides examples as to what amounts could be a photoprotecting effective amount. See, specification, page 5, line 10 to page 6, line 6 and Examples 1-2. As a result, one having ordinary skill in the art could readily determine the metes and bounds of Claim 9 in view of the specification.

Applicants have amended Claim 9 to clarify that each of the bacterium, yeast and carotenoid are present in a photoprotecting effective amount. Applicants have also amended Claim 9 to clarify that the derivatives thereof are based off of the carotenoid. Based on at least these noted reasons, Applicants believe that Claim 9 fully complies with 35 U.S.C. §112, second paragraph.

Accordingly, Applicants respectfully request that the rejection of Claim 9 under 35 U.S.C. §112 be withdrawn.

In the Office Action, Claim 9 is rejected under 35 U.S.C. §102(b) as anticipated by U.S. Patent No. 6,156,355 to Shields, Jr. et al (“*Shields*”). Applicants respectfully disagree with and traverse this rejection for at least the reasons set forth below.

Claim 9 recites, in part, a nutritionally complete pet food comprising a photoprotecting effective amount of at least one probiotic lactic acid bacterium, at least one yeast and at least one carotenoid, all included in an ingestible carrier. In contrast, Applicants respectfully submit that *Shields* fails to disclose or suggest every element of the present claim. For example, *Shields* fails to disclose or suggest a pet food comprising a photoprotecting effective amount of any of the lactic acid bacterium, yeast or carotenoid as required by Claim 9. In fact, *Shields* is not even concerned with and fails to even recognize the photoprotecting aspects of the claimed compositions.

For the reasons discussed above, Applicants respectfully submit that Claim 9 is novel, nonobvious and distinguishable from the cited reference.

Accordingly, Applicants respectfully request that the rejection of Claim 9 under 35 U.S.C. §102 be withdrawn.

In the Office Action, Claim 9 is rejected under 35 U.S.C. §103 as being unpatentable over *Shields* alone or in view of WO 02/28402 to Baur et al. ("*Baur*"). Applicants believe these rejections are improper and respectfully traverse them for at least the reasons set forth below.

As discussed previously, *Shields* does not teach, suggest, or even disclose all of the elements of the present claims, and thus, fail to render the claimed subject matter obvious for at least these reasons.

Regarding the combination of *Shields* and *Baur*, Applicants respectfully submit that the §103(c) rejection using *Baur* as a reference is improper. The present application, Application Serial Number 10/743,609, and *Baur*, were, at the time the invention of Application Serial Number 10/505,285 was made, owned by Nestec S.A. or subject to an obligation of assignment that would establish common ownership by Nestec S.A.. Therefore, in accordance with 35 U.S.C. §103(c) and MPEP 706.02(l)(1) and (2), Applicants respectfully submit that *Baur* should be removed as a reference, and that this rejection should be withdrawn.

Accordingly, Applicants respectfully request that the obviousness rejections with respect to Claim 9 be reconsidered and the rejections be withdrawn.

In the Office Action, Claim 9 has also been provisionally rejected under the judicially created doctrine of obviousness-type double patenting over Claims 1-10 and 25-30 of co-pending U.S. Application No. 10/505,305 and Claims 1-13 and 22-32 of co-pending U.S. Application No. 10/504,906. Submitted with this response is a Terminal Disclaimer disclaiming the terminal part

of any patent granted on the pending application extending beyond the expiration date of the following U.S. Patent Application Nos. 10/505,305 and 10/504,906.

Applicants further note that Claims 30-48 have been newly added. No new matter has been added thereby. The new claims are fully supported in the specification, for example, at page 4, line 10 to page 8, line 8 and Examples 1-2. Applicants respectfully submit that Claims 30-48 should be allowed.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

~~BELL, BOYD & LLOYD LLC~~

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